EXHIBIT 2

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Attorneys for Defendants Todd Dunning and Dunning Enterprise, Inc.

UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF CALIFORNIA

SAN JOSE DIVISION

EBAY, INC.,

Plaintiff,

v.

DIGITAL POINT SOLUTIONS, INC., SHAWN HOGAN, KESSLER'S FLYING CIRCUS, THUNDERWOOD HOLDINGS, INC., TODD DUNNING, DUNNING ENTERPRISE, INC., BRIAN DUNNING, BRIANDUNNING.COM, and DOES 1-20,

Defendants.

CASE NO.: CV-08-4052 JF

DECLARATION OF ROBERT J. BREAKSTONE IN SUPPORT OF DEFENDANTS TODD DUNNING AND DUNNING ENTERPRISE, INC.'S MOTION TO STAY ACTION PENDING RESOLUTION OF CRIMINAL PROCEEDINGS

Date: November 20, 2009
Time: 9:00 a.m.
Place: Courtroom 3, 5th Floor

Hon. Jeremy Fogel presiding

FREELAND COOPER & FOREMAN LLP
150 Spear Street, Suite 1800
San Francisco, California 94105

I, Robert J. Breakstone, declare:

1. I am an attorney licensed to practice in the State of California and the State of Illinois. My practice includes representing individuals involved in criminal investigations and under indictment for violations of federal criminal law, including crimes of fraud, theft of intellectual property, and racketeering activity.

2. On July 13, 2007, I was retained by Todd Dunning in connection with a criminal investigation being conducted by the United States Department of Justice / Federal Bureau of Investigation in the Northern District of California.

3. In connection with my representation of Todd Dunning, I contacted Assistant United States Attorney Kyle F. Waldinger who is in charge of the Computer Hacking and Intellectual Property Unit ("CHIP Unit") of the Office of the United States Attorney for the Northern District of California. Mr. Waldinger confirmed that there was a grand jury investigation involving Kessler's Flying Circus and Todd Dunning. Mr. Waldinger further confirmed that in connection with the investigation, the FBI had conducted several searches pursuant to warrant and that the FBI had interviewed Todd Dunning. Mr. Waldinger further indicated that he was aware that Commission Junction, Inc. had filed a civil action against Todd Dunning and Kessler's Flying Circus, among others. I indicated to AUSA Waldinger that no further contacts of Todd Dunning should be undertaken by Department of Justice personnel since Todd Dunning was represented by counsel.

4. In a subsequent telephone conference with Mr. Waldinger I asked whether it would be possible for Todd Dunning and Kessler's Flying Circus to obtain a copy of the computer hard drives and other records seized by the FBI from Brian Dunning's home. I explained that Todd Dunning and Kessler's Flying Circus needed those records in order to defend the case brought by Commission Junction, Inc. (Case No. 30-2008 00101025, Superior Court of the State of California, County of Orange Central Justice Center). Mr. Waldinger said that he would think about the request, but did not believe Todd Dunning had standing to challenge the seizure of the computer and records seized from his brother's house. I understood this to mean Mr. Waldinger believed that Todd Dunning was not entitled to copies of the records seized. He informed me

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that Brian Dunning's criminal counsel had made a similar request. As of the date of execution of this declaration, Mr. Waldinger has not changed his position.

5. On August 25, 2008, e-Bay, Inc. filed a complaint in Federal District Court for the Northern District of California, San Jose Division (Case No. CV 08-4052-JF) against Todd Dunning and others alleging fraud, racketeering, violation of California Penal Code, and California Business and Professions Code 17200.

6. On September 16, 2008, I contacted AUSA Waldinger who stated that attorney Sharon M. Bunzel (of O'Melveny & Myers) representing eBay in the aforementioned complaint (¶ 5 above) had sent AUSA Waldinger a copy of the complaint. AUSA Waldinger told me that Todd Dunning was a "subject" of a federal criminal investigation and that the FBI would be working aggressively to complete its investigation. The word "subject" is a term of art within the United States Department of Justice, and it is to be distinguished from a "witness". According to the United States Attorneys' Manual Section 9:11.151, it is the policy of the Department of Justice to advise a grand jury witness of his or her rights if such witness is a "target" or "subject" of a grand jury investigation. A "subject" of an investigation is a person whose conduct is within the scope of the grand jury's investigation.

7. As a result of the ongoing criminal investigation involving Todd Dunning as a "subject", I have advised Mr. Dunning to assert his Fifth Amendment privilege against self-incrimination in response to any questions asked of him at any deposition, in response to any interrogatory or request for admission, and in response to a demand for production of documents.

8. I have reviewed the complaint in this matter and based on my understanding of the allegations and issues in this civil matter, Mr. Dunning plans to continue to assert his Fifth Amendment privilege against self-incrimination. Based upon my experience, I believe that the ongoing federal criminal investigation concerns identical issues raised in eBay's complaint. In my opinion, any court order compelling Mr. Dunning to respond to the allegations of the complaint, and/or to respond to discovery propounded to him would constitute "compelled self-incrimination" within the meaning of the Fifth Amendment and California's constitutional privilege against self-incrimination. (*See, People v. Lucas,* (1995) 12 Cal. 4th at 415, 453.)

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I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed this 30th day of September, 2009, at San Francisco, California.

ROBERT J. BREAKSTONE

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